

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KERI MCCELMURRY AND KAREN)
MRAZEK INDIVIDUALLY, and on)
Behalf of All Similarly)
Situated) No. CV-04-642-HU
)
Plaintiffs,)
)
)
v.) ORDER
)
US BANK NATIONAL ASSOCIATION,)
)
Defendant.)
)

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1 - ORDER

1 HUBEL, Magistrate Judge:

2 Plaintiffs Keri McElmurry and Karen Mrazek bring this Fair
3 Labor Standards Act (FLSA) action on behalf of all similarly
4 situated plaintiffs and against defendant US Bank National
5 Association. On December 1, 2005, I entered an Order denying
6 plaintiffs' motion to conditionally certify their claims related to
7 Sales and Service Managers (SSMs) as a collective action and to
8 provide notice, with leave to renew the motion after obtaining
9 additional discovery. The additional discovery at issue is
10 defendant's response to plaintiffs' Interrogatories 10 and 11
11 seeking the names, addresses, phone numbers, and termination dates
12 of all SSMs in Oregon and Washington terminated within the
13 preceding three years, and the business location where the SSM had
14 been employed.

15 Following my December 1, 2005 Order, I expected the parties to
16 meet and confer regarding the production of the responses to the
17 interrogatories and any follow-up discovery to be conducted as a
18 result of the production. On December 16, 2005, I held a brief
19 telephone hearing with counsel on the issue. At that time, I
20 ordered that defendant produce the interrogatory responses by
21 January 6, 2006, and that additional follow-up discovery conclude
22 by March 10, 2006, with a renewed certification motion, if any is
23 to be filed, due no later than March 24, 2006. The parties raised
24 issues regarding exactly how plaintiffs' counsel was to contact the
25 identified SSMs and what contacts defense counsel would be able to
26 initiate with the former SSMs. No resolutions were achieved, but
27 concerns were expressed. I urged the parties to work on the issues
28 themselves but invited them to contact the Court if they could not

1 reach agreement.

2 As a result of the request of counsel, I held another hearing
3 on these issues on January 12, 2006. At that time, defendant had
4 produced its responses to Interrogatories #10 and 11 only in camera
5 to the Court because it could not obtain plaintiffs' counsel's
6 assurance that plaintiffs' counsel would not initiate contact with
7 the SSMs until the Court could address and rule on defendant's
8 concerns about such contact. Defendant expressed concern that any
9 mailing by plaintiffs' counsel to the SSMs would amount to a de
10 facto notice, when plaintiffs' notice motion had in fact been
11 denied. Defendant proposed that each party pick five names from
12 the list produced and that joint depositions of the ten chosen SSMs
13 take place. Plaintiffs oppose this. Additionally, both counsel
14 have raised ethical concerns regarding each side's contact with the
15 SSMs who are putative collective action members and thus putative
16 clients of plaintiffs' counsel.

17 The January 12, 2006 hearing gave the parties the opportunity
18 to raise and discuss their differences regarding this additional
19 discovery allowed in the December 1, 2005 Order. The continuing
20 disputes and issues in this regard have caused the Court to
21 reconsider its conclusion in the December 1, 2005 Order. As noted
22 in that Order:

23 The case history indicates that the case posture is
24 much closer to the second stage inquiry than the first
25 initial stage inquiry. While I could resolve the motion
26 under the first initial stage inquiry and allow the
27 outstanding discovery to proceed, I would only be
28 inviting a decertification motion by defendant once it
had produced that discovery, requiring that the similarly
situated issue be analyzed a second time. Allowing the
discovery now, and conducting the similarly situated
analysis only once, is more efficient and makes better
use of judicial resources.

1 Dec. 1, 2005 Order at p. 20. As indicated there, I based my
2 conclusion in the December 1, 2005 Order at least in part on the
3 idea that it would be more judicially efficient to allow the
4 discovery to occur and then reconsider plaintiffs' renewed motion,
5 rather than conditionally or provisionally certify the SSM claims
6 and then entertain a motion to decertify at a later date. However,
7 the fact that the parties have been unable to reach agreement on
8 the method for obtaining the follow-up discovery necessitated by
9 the production of the SSM names has caused me to reconsider my
10 conclusion and examine the possibility that it may be more
11 efficient to conditionally certify the motion and allow notice to
12 be sent more formally and under the auspices of the Court.

13 However, before making a final determination as to whether to
14 change my December 1, 2005 ruling, and as explained at the January
15 12, 2005 hearing, I order the parties to evaluate and present their
16 positions to one another regarding how contact with the SSMs is to
17 be made (e.g. by plaintiff's counsel, by defense counsel, by both
18 counsel, etc.), under either scenario, that is, under a conditional
19 certification of a collective action, or under the present
20 circumstances as discovery potentially leading to a renewed motion
21 to certify. It is clear to the Court that contact one way or the
22 other is required to allow plaintiffs to present their best case
23 for collective action certification and to allow defendant to
24 present its best case in opposition to such certification. This
25 discussion among counsel must be in person or in conversation over
26 the telephone. Email and letter exchanges alone are not
27 sufficient.

28 I further order that the parties, after their initial meet and

1 confer outlined in the previous paragraph, appear in person on
2 February 2, 2006, at 9:00 a.m., in the jury room of Courtroom 9B
3 for continued face to face conferral regarding these issues. The
4 parties should plan to attend until 12:00 p.m. (if the parties
5 believe that additional time is needed, they should notify the
6 courtroom deputy as soon as possible). Upon request of the
7 parties, I will arrange for a Judge of this Court, other than the
8 Judge(s) assigned to the case, to assist the parties in reaching
9 resolution on these discovery issues, if necessary. I will also be
10 available at that time to address any issues more appropriately
11 decided by me as the Judge assigned to the case.

12 Finally, I order defendant to produce the responses to
13 Interrogatories #10 and 11 to plaintiff no later than January 13,
14 2006. However, neither plaintiffs nor defendant may contact any of
15 the persons identified in the response until a plan for the follow-
16 up discovery is agreed to by the parties or ordered by the Court,
17 following the February 2, 2006 meeting.

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CONCLUSION

2 The parties are ordered to meet and confer regarding follow-up
3 discovery allowed by the December 1, 2005 Order. The parties are
4 to appear in the jury room of Courtroom 9B at 9:00 a.m., February
5 2, 2006, for an additional in-person meet and confer session.
6 Defendant is to produce the responses to Interrogatories #10 and 11
7 to plaintiff no later than January 13, 2006, but no contact with
8 any of the persons identified in the responses is to occur until a
9 plan for the follow-up discovery is in place, following the
10 February 2, 2006 meeting.

IT IS SO ORDERED.

Dated this 12th day of January, 2006.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge